

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES W. HOWELL

Claimant

VS.

ASPHALT CONSTRUCTION COMPANY

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 241,333

ORDER

Claimant appeals from an April 9, 1999 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish.

ISSUES

Claimant alleges two separate accidents in this single docketed claim. The first is alleged to have occurred on or about August 7, 1998 and the second on or about November 14, 1998. The Administrative Law Judge denied claimant's request for preliminary benefits finding claimant failed to provide timely notice and "in addition, the court is unable to find any medical evidence to support the Claimant's assertion of a traumatic injury and all the medical evidence indicates a natural aging process." This second finding by the ALJ gives rise to a disputed issue of whether claimant suffered accidental injury. Respondent also denies claimant sustained injury that arose out of and in the course of his employment. These issues are considered jurisdictional and are subject to review by the Board on an appeal from a preliminary hearing order.¹

FINDINGS OF FACT

1. Claimant filed a form E-1 Application for Hearing on January 22, 1999 alleging an accident "8/7/98 and each and every working day thereafter with specific injury on 11/14/98 and each and every working day thereafter through the last day worked." Claimant states his injuries were to his low back with pain radiating into his legs. The form E-1 describes the cause of the August 7, 1998 injury as "twisted back while trying to put tarp on truck." The November 14, 1998 injury is alleged to have occurred when claimant "fell while trying to get

¹ K.S.A. 1998 Supp. 44-534a(a)(2) and K.S.A. 1998 Supp. 44-551(b)(1).

into truck." The each and every working day accidents or aggravations were apparently intended to be covered by the phrase "repetitive work duties." The form E-3 Application for Preliminary Hearing filed February 17, 1999 contained a similar description of the accident dates. Claimant's brief to the Appeals Board, however, mentions only the two specific accident dates of August 7, 1998 and November 14, 1998.

2. Claimant has worked for respondent about 14 years. He describes an incident occurring Friday, August 7, 1998, when his foot slipped while climbing on his truck causing him to fall backwards. He broke his fall by grabbing a handle on the truck which caused his body to twist around. Claimant did not think he was injured until the next day when he started having pain in his leg. The following Monday he told his supervisor that he was going to go to the doctor. Claimant did not tell his supervisor at that time that he had injured himself on the job because, according to claimant, he was not "hurting enough" and because the injury had not stopped him from working. But, claimant said the people he worked with knew his back was bothering him because he started wearing a back brace at work and talked about it.

3. On Monday, August 10, 1998, claimant went to his personal physician, Dr. R. David Gile. According to claimant, when asked by the doctor what happened, claimant described the accident at work and said he had pain in his legs. Dr. Gile suspected a spinal injury and ordered an MRI and what claimant described as "electrical treatment," which probably refers to the EMG/NCS.

4. Claimant was seen by neurologist Michael M. Vesali, M.D., on August 18 or 19, 1998² as a referral from Dr. Gile. Dr. Vesali recommended several tests including an MRI of the lumbosacral spine and an EMG/nerve conduction study to evaluate radiculopathy and peripheral neuropathy. Dr. Vesali's August 20, 1998 report describes claimant having a history of "subacute and slowly progressive low back pain which dates back to three years ago and has been considerably worse over the past month and characterized by radicular symptoms down both lower extremities."³ Claimant denies telling Dr. Vesali that he had been having low back pain over approximately three years but admits telling him that it had gotten worse over the past month.

5. Claimant testified that he reported to his employer that his injury was work related after he received a letter from his health insurance carrier, Blue Cross Blue Shield, denying coverage because the injury was work related. Claimant believes that he received the letter within 10 days of the date he first saw Dr. Gile. But claimant also testified he received the letter from Blue Cross Blue Shield after he had seen both Dr. Gile and Dr. Vesali but before the MRI.

² Dr. Vesali's office notes are dated August 18, 1998, but his narrative report says he saw claimant on August 19, 1998.

³ Dr. Vesali's August 18, 1998 office note contains a history of intermittent low back pain developing approximately two years ago, not three.

6. Claimant gave the letter to his supervisor, Ed Ramey. Claimant continued to work, but with pain, until the November 14, 1998 accident.

7. Mr. Edward Ramey is a truck foreman for respondent and had supervisory responsibility over claimant. He testified to having weekly safety meetings and occasionally the subject of workers compensation would be discussed. In addition, all the drivers are told that if they have an accident they are to report it to him. Also, the informational poster supplied by the Division of Workers Compensation is posted on a bulletin board at the office. According to Mr. Ramey, he did not know of claimant's alleged August 1998 accident until January 7, 1999 when he completed an accident report. He admitted, however, that claimant gave him a letter from Blue Cross Blue Shield sometime in August or September of 1998. But Mr. Ramey did not know what the letter was for other than that Blue Cross Blue Shield was denying some bill. He said claimant did not tell him that the bill was for a work-related accident. Mr. Ramey was asked about any conversation he had with claimant concerning the Blue Cross Blue Shield letter.

Q. Sir, do you remember when you were presented with the letter from Blue Cross/Blue Shield?

A. I do not know the exact dates, no.

Q. Would that have been before the November 10 or November 14 or November incident?

A. Yes.

Q. Do you remember the discussion that you had when you were presented with the Blue Cross/Blue Shield denial?

A. No. Charles just asked me if I would take it to the office and find out what the problem was and I did that.

Q. And what was the problem?

A. I didn't hear anything after that.

Q. So no follow-up?

A. No.

Mr. Ramey also said he remembered the day claimant took off work to see the doctor but although claimant told Mr. Ramey he needed to see the doctor for his back, claimant did not say anything about it being work related. Likewise, when claimant brought him the denial letter from Blue Cross Blue Shield Mr. Ramey says claimant did not tell him it was work related and he did not ask claimant anything about how claimant had injured his back.

8. On November 14, 1998 claimant was getting into his truck when his foot slipped off the running board causing him to fall backwards, knocking his head on the ground. The next thing he remembers is Cathy Deal, a coworker, and Larry Baker, his supervisor, helping him up.

9. Between the August and the November 1998 injuries claimant's back pain was intermittent but he was not receiving treatment for his back when he had the November accident. The November accident made his low back and leg pain much worse and since

then it has continued to worsen. Claimant has not worked since being laid off by respondent on December 23, 1998.

10. Catherine Deal testified that on November 14, 1998 she saw claimant lying on the ground so she went to see if he was alright. She then ran and told claimant's supervisor, Larry Baker, that claimant had fallen. She and Mr. Baker together helped claimant up but she did not stay around to talk with claimant to find out if he was injured since his supervisor was there.

11. Mr. Ramey did not become aware of the November 1998 accident until January 1999 when claimant called and said he needed to have an MRI done and Blue Cross Blue Shield would not pay the bill. Mr. Ramey identified Larry Baker as the asphalt foreman of the job claimant was working on in November but said Mr. Baker never said anything to him about claimant's accident.

12. Claimant testified he did not know anything about workers compensation law, including a 10-day reporting requirement. Claimant admitted that over the course of his employment with respondent he has had many accidents. Some of them he reported and some he did not. Usually, he just went to the doctor on his own.

CONCLUSIONS OF LAW

Claimant is a 14 year employee of respondent performing manual labor with a history of many accidents. The claimant's method of dealing with accidents at work is inconsistent with some being reported and some not and no clear pattern as to how claimant determines which he will report. Respondent's policy was for workers to report all accidents but it is not clear that this policy was explained to or understood by claimant. Injuries were not an infrequent occurrence and claimant would often handle them informally and seek medical treatment on his own.

Nevertheless, with respect to the August 7, 1998 accident, respondent was aware by the following Monday that claimant was having back problems and was going to the doctor. Not long thereafter claimant presented Mr. Ramey with a denial letter from Blue Cross Blue Shield with the request he look into the reason for the denial. Mr. Ramey agreed to do that and delivered the letter to some unidentified person at respondent's office. Mr. Ramey did not directly contradict claimant's contention that the letter was delivered to him within 10 days of his accident recalling only that it was probably during August or September. The letter itself was not introduced and the date of the letter is not in evidence.

Given that claimant gave Dr. Gile a history of an injury at work, it seems apparent that any inquiry with Blue Cross Blue Shield would have revealed that medical treatment was denied due to its being for a work-related injury. Thus, the denial letter, in context, should have alerted respondent to an alleged work-related injury and therefore constitutes notice. Neither claimant nor respondent can recall the exact date of the letter or when it was delivered to respondent. Claimant testified he gave the letter to Mr. Ramey within 10 days

of his accident or close to it. But claimant also described the date as being after his August 18 or 19 appointment with Dr. Vesali. Not counting intermediate Saturdays and Sundays the tenth day would have been the 21st of August.⁴ From the evidence presented to date, the Appeals Board finds that claimant gave timely notice of his August 7, 1998 accidental injury. The Appeals Board further finds that claimant's August 7, 1998 injury arose out of and in the course of his employment with respondent.

The Appeals Board finds that respondent had actual knowledge of the November 14, 1998 injury. Although the actual fall was not witnessed, the job foreman, Larry Baker, helped claimant to his feet. That individual did not testify concerning what may have been said and claimant's description of the accident is uncontradicted. In workers compensation litigation, uncontradicted evidence which is not improbable or unreasonable cannot be disregarded unless shown to be untrustworthy.⁵ Claimant's version of events is supported by the testimony of Ms. Deal.

As the Appeals Board has found that claimant has proven personal injury by accident on the dates alleged and timely notice of accident, this claim should be remanded to the ALJ for further orders consistent with these findings.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 9, 1999 Order entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, reversed and remanded for further orders on claimant's request for preliminary benefits.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Anton C. Andersen, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

⁴ See K.A.R. 51-17-1; *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996); and *Bain v. Cormack Enterprises, Inc.*, WCAB Docket No. 222,967 (October 1998).

⁵ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).